

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA

Plaintiff,

V.

DAVID ROUTE,

Defendant.

CASE NO. CR17-302-RSM

**ORDER DENYING DEFENDANT'S
EMERGENCY MOTION FOR
COMPASSIONATE RELEASE**

I. INTRODUCTION

This matter comes before the Court on its previous order staying Defendant David Route's Emergency Motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1). Dkt. #86. Plaintiff United States of America ("the Government") has opposed Defendant's motion. Dkt. #82. The Court finds oral argument unnecessary to rule on this motion. Having considered the Motion, the Government's Response, Defendant's Reply, and the remainder of the record, the Court DENIES Mr. Route's motion for compassionate release.

II. BACKGROUND

A full summary of this case is not necessary given this Court's previous order on Mr. Route's motion for compassionate release. Dkt. #86. On December 11, 2018, the Court sentenced Defendant to 96 months in custody to run concurrently with 24 months in custody for violations

**ORDER DENYING DEFENDANT'S
EMERGENCY MOTION FOR
COMPASSIONATE RELEASE - 1**

1 of supervised release conditions, *see* CR09-356-RSM, with three years of supervised release to
 2 follow. Dkt. #61. Mr. Route's projected release date is July 28, 2024. Dkt. #79 at ¶ 7.

3 Over the past months, public understanding of the COVID-19 virus and its corresponding
 4 risks to inmates and staff at Bureau of Prison ("BOP") facilities have evolved. The U.S. Centers
 5 for Disease Control and Prevention has continued to update its guidance on the coronavirus,
 6 advising that certain populations are at heightened risk of severe complications and/or death if they
 7 contract COVID-19. These populations include individuals over the age of 65 and those with
 8 chronic medical conditions, including moderate to severe asthma, serious heart conditions, liver
 9 disease, and immunocompromised patients. *See* U.S. Ctrs. for Disease Control and Prevention,
 10 (April 15, 2020), *Coronavirus Disease 2019-COVID, People who are at higher risk for severe*
 11 *illness*, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
 12 [risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) (last reviewed May 7, 2020) ("CDC Guidelines").¹

13 In response to public health officials' warnings about the spread of COVID-19 and the risk
 14 of severe complications in certain populations, all levels of government have implemented
 15 widespread "social distancing" measures. *See, e.g.*, W.D. Wash. Gen. Order No. 07-20 (April 14,
 16 2020) (continuing all in-person proceedings scheduled to occur before July 1, 2020). On March
 17 26, 2020, the U.S. Attorney General issued guidance to the Director of the BOP for transferring
 18 certain at-risk inmates to home confinement, including those who are non-violent and pose
 19 minimal likelihood of recidivism. Dkt. #78 at 3-4. In this memorandum, the U.S. Attorney
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 21

22 ¹ Pursuant to Fed. R. Evid. 201(c)(1), the Court takes judicial notice *sua sponte* of public records related to the
 23 COVID-19 health crisis, including documents available through government agency websites. *Gustavson v. Wrigley*
Sales Co., No. 12-CV-01861-LHK, 2014 WL 60197, at *3 (N.D. Cal. Jan. 7, 2014).

1 General listed age and vulnerability of the inmate based on the CDC Guidelines as discretionary
 2 factors for the BOP to consider.

3 On April 7, 2020, Mr. Route filed a BP-9 application with the Bureau of Prisons (“BOP”)
 4 staff for a reduction in his sentence in light of the COVID-19 health crisis. Dkt. #79 at 4-5. On
 5 April 16, 2020, Mr. Route moved this Court to grant him compassionate early release to supervised
 6 release pursuant to 18 U.S.C. § 3582(c)(1). Dkt. #78. At the time of filing the instant motion,
 7 BOP had not responded to Mr. Route’s April 7 request. Dkt. #79 at ¶ 3. Finding that Defendant
 8 failed to exhaust his administrative remedies, this Court stayed Mr. Route’s motion until May 7,
 9 2020 or until such a time that he exhausted his administrative remedies. Dkt. #86. Given that
 10 thirty days have now elapsed since he submitted his request to the warden, Mr. Route has satisfied
 11 the exhaustion requirements in 18 U.S.C. § 3582(c)(1). Accordingly, the Court will address the
 12 merits of his motion.

13 III. DISCUSSION

14 A. Legal Standard

15 Pursuant to 18 U.S.C. § 3582(b), a judgment of conviction that includes a sentence of
 16 imprisonment “constitutes a final judgment and may not be modified by a district court except in
 17 limited circumstances.” *Dillon v. United States*, 560 U.S. 817, 824 (2010) (internal quotations
 18 omitted). Those limited circumstances are provided under 18 U.S.C. § 3582(c)(1)(A)(i). Effective
 19 December 21, 2018, the First Step Act of 2018 amended Section 3582(c)(1)(A) by adding a
 20 provision that allows prisoners to directly petition a district court for compassionate release:

21 (A) the court, upon motion of the Director of the Bureau of Prisons, *or upon*
 22 *motion of the defendant after the defendant has fully exhausted all administrative*
rights to appeal a failure of the Bureau of Prisons to bring a motion on the
defendant’s behalf or the lapse of 30 days from the receipt of such a request by
 23 *the warden of the defendant’s facility, whichever is earlier*, may reduce the term
 of imprisonment (and may impose a term of probation or supervised release with

1 or without conditions that does not exceed the unserved portion of the original
2 term of imprisonment), after considering the factors set forth in section 3553(a) to
the extent that they are applicable, if it finds that—

- 3 (i) extraordinary and compelling reasons warrant such a reduction; or
4 (ii) the defendant is at least 70 years of age, has served at least 30 years in prison,
5 pursuant to a sentence imposed under section 3559(c), for the offense or offenses
6 for which the defendant is currently imprisoned, and a determination has been
made by the Director of the Bureau of Prisons that the defendant is not a danger to
the safety of any other person or the community, as provided under section
3142(g);

7 and that such a reduction is consistent with applicable policy statements issued by
8 the Sentencing Commission

9 18 U.S.C. § 3582(c)(1)(A) (italics reflecting amendment under First Step Act). Accordingly, a
10 court may reduce a sentence upon motion of a defendant provided that: (1) the inmate has either
11 exhausted his or her administrative appeal rights of BOP's failure to bring such a motion on the
12 inmate's behalf or has waited until 30 days after the applicable warden has received such a request;
13 (2) the inmate has established "extraordinary and compelling reasons" for the requested sentence
14 reduction; and (3) the reduction is consistent with the Sentencing Commission's policy statement.

15 See *id.*

16 The Sentencing Commission's policy statement referenced in 18 U.S.C. § 3582(c)(1)(A)(i)
17 provides, in relevant part:

18 [T]he court may reduce a term of imprisonment (and may impose a term of
supervised release with or without conditions that does not exceed the unserved
19 portion of the original term of imprisonment) if, after considering the factors set
forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court
determines that—

- 21 (1)(A) Extraordinary and compelling reasons warrant the reduction; or
22 (B) The defendant (i) is at least 70 years old; and (ii) has served at least 30 years in
23 prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or
offenses for which the defendant is imprisoned;

(2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

United States Sentencing Guidelines (“USSG”) § 1B1.13. Given that Mr. Route is 32 years old, only sections (1)(A), (2), and (3) of the Sentencing Commission’s policy statement are relevant to his motion. Thus, under the policy statement, Mr. Route is entitled to relief if he demonstrates that (1) extraordinary and compelling reasons warrant a sentence reduction, (2) he is not a danger to the safety of others or the community, and (3) any requested reduction is consistent with the policy statement. *See* USSG § 1B1.13(1)(A), (2), (3).

The Sentencing Commission’s application notes to this policy statement provide further guidance. Application Note 1 to USSG § 1B1.13 provides that “extraordinary and compelling reasons” for a sentence reduction exist when:

(A) Medical Condition of the Defendant.

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition, (II) suffering from a serious functional or cognitive impairment, or (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

USSG 1B1.13 cmt. n.1(A). The application note also addresses family circumstances and circumstances involving defendants who are at least 65 years old. *See id.* at n.1(B)-(C). Neither of these circumstances are applicable to Mr. Route's motion. Furthermore, subpart (D) provides

1 a catch-all provision for “other reasons” that may exist as determined by the Director of the BOP.
 2 *Id.* at n.1(D). Mr. Route does not contend that the Director of BOP has determined that an
 3 extraordinary or compelling reason for a sentence reduction exists here.

4 **B. Extraordinary and Compelling Reasons**

5 Defendant bears the burden of establishing that extraordinary and compelling reasons exist
 6 that justify compassionate release. *Riley v. United States*, No. C19-1522 JLR, 2020 WL 1819838,
 7 at *7 (W.D. Wash. Apr. 10, 2020). Here, Mr. Route argues that the general seriousness of the
 8 COVID-19 pandemic poses such an extraordinary and compelling circumstance for early release
 9 of “at least certain defendants.” Dkt. #78 at 10. Defendant’s motion and reply brief do not identify
 10 any risk factors placing him at higher risk for severe illness from the virus. Furthermore, as of
 11 May 7, 2020 no inmates or staff at FCI Herlong have tested positive for COVID-19. See Federal
 12 Bureau of Prisons, Covid-19 Cases, <https://www.bop.gov/coronavirus/index.jsp> (last visited May
 13 7, 2020). Instead, Defendant argues that the COVID-19 pandemic, in general, constitutes an
 14 “extraordinary and compelling circumstance” necessitating his immediate release. See Dkt. #84
 15 at 5-6. This Court has previously rejected this generalized argument. See *Riley*, 2020 WL
 16 1819838, at *7 (Concluding that “extraordinary and compelling” circumstances are not satisfied
 17 by “the mere elevated risk of contracting a pandemic virus in prison, even if such a higher risk
 18 exists.”).

19 On May 7, 2020, Mr. Route filed supplemental authority claiming that he suffers from
 20 hypertension. Dkt. #87. Attached in support of this claim is Mr. Route’s “Vitals All” records
 21 excerpted from the BOP’s medical records. See Dkt. #89. As an initial matter, Defendant’s
 22 counsel offers no explanation for the delay in raising this argument, despite the fact that the CDC
 23 listed hypertension as a risk factor for severe illness no later than April 17, 2020. See *People at*

1 *Risk for Serious Illness from COVID-19*, Centers for Disease Control and Prevention, (April 17,
2 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
3 risk.html (listing risk factors for severe illness from COVID-19). Furthermore, even if the Court
4 considers these supplemental records, it cannot conclude without any medical diagnosis that Mr.
5 Route suffers from a condition that places him at high risk for severe illness from COVID-19.
6 Defendant's counsel argues that “[b]eginning on July 31, 2017, Mr. Route's blood pressure
7 readings indicate he suffers from stage 1 hypertension.” Dkt. #87 at 3. Counsel bases this
8 conclusion on a report from the American College of Cardiology revising its definition of high
9 blood pressure from 140/90 mm Hg to 130/80 mm Hg, and the fact that Mr. Route's transcripts
10 show “eight readings in the 130s from 2017 to 2019.” *See id.* However, the BOP transcripts make
11 no mention of a diagnosis of hypertension, nor can the Court find any reference to a hypertension
12 diagnosis in Mr. Route's sentencing materials from November 2018. In effect, Defendant's
13 supplemental brief asks the Court to make an independent medical diagnosis based solely on its
14 review of Mr. Route's vitals and counsel's interpretation of those vitals. The Court declines to do
15 so. For this reason, the information contained in Defendant's May 7, 2020 supplemental brief is
16 insufficient to satisfy Defendant's burden of demonstrating extraordinary and compelling reasons
17 for release.

18 While the Court does not discount the dangers associated with COVID-19 at a facility like
19 FCI Herlong, Mr. Route has presented insufficient evidence to show that he is at higher risk to
20 suffer the more severe effects of the virus or that he otherwise suffers from a “serious physical or
21 mental condition . . . that substantially diminishes” his “ability to provide self-care within the
22 environment of a correctional facility and from which he is not expected to recover.” USSG §
23

1B1.13, cmt. n.1(A)(ii). Accordingly, the Court cannot conclude that Mr. Route has demonstrated
extraordinary and compelling reasons to reduce his sentence.

3 C. Danger to Others or the Community

4 The Court finds that denial of Mr. Route's motion is appropriate on the independent basis
5 that he has not shown that he poses no danger to others or to the community. *See USSG §*
6 1B1.13(2). In making this determination, a court looks to the nature and circumstances of the
7 defendant's underlying offense, the weight of evidence against him or her, his or her history and
8 characteristics, and the nature and seriousness of the danger his or her release would pose to any
9 person or the community. *See 18 U.S.C. § 3142(g).*

10 Here, Mr. Route was convicted of felon in possession of a firearm, 18 U.S.C. § 922(g)(1),
11 and sentenced to 96 months in custody to run concurrently with 24 months in custody for violations
12 of supervised release conditions. Dkt. #61. Defendant contends that he poses no risk to the
13 community given that his prior drug and firearm convictions are "non-violent." Dkt. #84 at 5-6.
14 The Court disagrees. The incident that resulted in Mr. Route's current conviction occurred in July
15 2017, during his supervised release, when he was arrested for unlawful possession of two
16 firearms—including one sold to another felon. The Court cannot reasonably conclude that Mr.
17 Route's persistent involvement with firearms and his repeated violations of supervised release
18 conditions pose no danger to others or the community. Furthermore, while Defendant argues that
19 his behavior in prison supports his request for early release, *see* Dkt. #78 at 11, his prison
20 disciplinary record reflects numerous infractions dated as recently as June 2019. *See* Dkt. #82-1.
21 For these reasons, the Court is not persuaded that the remaining factors referenced in Defendant's
22 motion, such as his release plan to live with his sister, support from extended family, and ability
23 to return to prior employment, would meaningfully mitigate his continuing danger to others and

1 the community. *See* Dkt. #78 at 11. On this independent ground, the Court finds denial of release
2 appropriate.

3 **D. Reduction Consistent with USSG Policy Statement**

4 Having found that that Mr. Route has failed to demonstrate (1) extraordinary and
5 compelling reasons warranting compassionate release or (2) that he poses no danger to others or
6 to the community, the Court need not consider whether a sentence reduction would be consistent
7 with the Sentencing Commission's policy statement. *See* 18 U.S.C. § 3582(c)(1)(A); USSG §
8 1B1.13.

9 **IV. CONCLUSION**

10 For the reasons set forth above, Mr. Route's motion for compassionate release, Dkt. #78,
11 is DENIED.

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13 Dated this 8th day of May, 2020

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16 
17 RICARDO S. MARTINEZ
18 CHIEF UNITED STATES DISTRICT JUDGE
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